

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DEANNA JACKSON,

Plaintiff,

Case No. C13-1560-TSZ-BAT

V.

CAROLYN W. COLVIN, Commissioner of
Social Security,

Defendant.

REPORT AND RECOMMENDATION

Deanna Jackson¹ appeals the ALJ's written decision finding her not disabled.² Ms. Jackson contends that by failing to consider the side effects of her medications on her ability to work, the ALJ erroneously found she retained the Residual Functional Capacity ("RFC") to perform her past work as an accountant and was not disabled. Dkt. 20 at 1. For the reasons set forth above, the Court recommends the Commissioner's final decision be **REVERSED** and the case be remanded for further proceedings under sentence four of 42 U.S.C. § 405(g).³

BACKGROUND

The procedural history is not in dispute and need not be discussed. There also is no dispute as to the ALJ's written findings at steps one through three of the five-step sequential

¹ Ms. Jackson is referred to as Deanna Becker in the record below.

² The parties agree this decision is the Commissioner's final order.

1 evaluation process: Ms. Jackson last worked on November 17, 2010 (step one); her severe
2 impairments include disorders of the spine and obesity (step-two); and none of these
3 impairments meet the requirements of the Listings (step-three). Tr. 15-16. At issue are the
4 ALJ's findings that Ms. Jackson had the RFC to perform the full range of sedentary work, could
5 perform her past work as an accountant with this RFC, and that she was therefore not disabled.
6 Tr. 16- 18.

7 **DISCUSSION**

8 Ms. Jackson contends that the ALJ erred by failing to consider the side effects of her pain
9 medications. Dkt. 19 at 4. Ms. Jackson testified at the hearing conducted by the ALJ and made
10 other statements of record that her medications made her sleepy and made it hard for her to
11 concentrate on her work. *See e.g.*, Tr. 34, 171, 188, 203. The Commissioner concedes the ALJ
12 "did not specifically mention medication side effects within his decision." Dkt. 20 at 5.

13 An ALJ should consider all factors that might have a significant impact on an
14 individual's ability to work, including side effects of medications. SSR 96-7p; *Erickson v.*
15 *Shalala*, 9 F.3d 813, 817-18 (9th Cir. 1993) (citing *Varney v. Secretary of HHS*, 846 F.2d 581,
16 585 (9th Cir. 1987) (superseded on other grounds)). The Commissioner recognizes this
17 requirement but argues that the ALJ had no duty to discuss Ms. Jackson's testimony about
18 medication side effects because there is a clear "inference" and "it is logical to conclude the ALJ
19 rejected [her testimony] based on his credibility assessment." Dkt. 20 at 5. The argument fails.
20 First, the argument is speculative. There is nothing in the record establishing the ALJ considered
21 Ms. Jackson's side effects testimony and no basis to conclude exactly how the ALJ assessed that
22 testimony. The fact that the ALJ omitted discussion of the side effects testimony indicates the
23 ALJ overlooked the testimony, not that the ALJ intended to discount it as the Commissioner

1 claims. *Id.*

2 Second, implicit rejections are generally insufficient. *Cf. Salvador v. Sullivan*, 917 F.2d
 3 13, 15 (9th Cir. 1990) (mere summarization and implicit rejection of treating physician's opinion
 4 does not suffice); *McAllister v. Sullivan*, 888 F.2d 599, 602-03 (9th Cir. 1989, as amended Oct.
 5 19, 1989) (broad and vague reasons will not suffice to support ALJ's conclusions).

6 Third, because the ALJ did not find Ms. Jackson was malingering, the ALJ was required
 7 to reject her side effects testimony by providing specific findings stating clear and convincing
 8 reasons for doing so. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). Here, as the
 9 ALJ gave no reasons to reject the testimony, the ALJ failed to provide clear and convincing
 10 reasons to reject Ms. Jackson's side effects testimony, and the Court cannot determine what the
 11 ALJ found or did not find as to side effects. *Cf. Connell v. Barnhart*, 340 F.3d 871, 874 (9th
 12 Cir. 2003) (court cannot engage in independent fact-finding but is "constrained to review the
 13 reasons the ALJ asserts").

14 Fourth, the Commissioner's extensive discussion of how the ALJ properly discounted
 15 Mr. Jackson's testimony about other limitations is irrelevant. Even if the ALJ correctly
 16 evaluated the medical evidence about Ms. Jackson's pain and physical limitations, and Ms.
 17 Jackson's testimony about these limitations, the Court is still confronted with a record that shows
 18 the ALJ failed to address Ms. Jackson's testimony about the side effects of her medications. It is
 19 the ALJ's responsibility to determine credibility and weigh the evidence. *Andrews v. Shalala*, 53
 20 F.3d 1035, 1039 (9th Cir. 1995). That did not occur here, and the Court cannot in the first
 21 instance make findings regarding the side effects of Ms. Jackson's medications.

22 And last, under *Varney*, an ALJ may not reject a claimant's testimony about the
 23 subjective limitations of medication side effects without making specific findings similar to those

1 required for excess pain testimony. *Varney*, 846 F.2d at 585. In *Varney*, the claimant testified
 2 about the side effects of her medications. The ALJ acknowledged *Varney*'s testimony but did
 3 not make any findings with regards to side effects. *Id.* The Ninth Circuit Court of Appeals held:

4 if the Secretary chooses to disregard a claimant's testimony as to
 5 the subjective limitations of side effects, he must support that
 6 decision with specific findings similar to those required for excess
 7 pain testimony, as long as the side effects are in fact associated
 8 with the claimant's medication(s). *Cf. Cotton*, 799 F.2d at 1407;
 9 *see also Figueroa v. Secretary of Health, Education and Welfare*,
 10 585 F.2d 551, 554 (1st Cir. 1978) (ALJ must make finding on
 11 appellant's claim regarding side effects of medication). Because no
 12 such findings were made here, we remand the matter so that, as in
 13 the case of the pain testimony, the ALJ may either accept *Varney*'s
 14 evidence regarding side effects or make specific findings rejecting
 15 such evidence. Again, any specific findings rejecting her testimony
 16 must be supported by the record and will be subject to further
 17 review by the courts.

18 *Id.* at 585-86. The *Varney* decision applies squarely to Ms. Jackson's case. As in *Varney*,
 19 although Ms. Jackson testified about her medication side effects, the ALJ committed reversible
 20 error by failing to address or give any reasons for accepting or rejecting that testimony.

21 The Court notes that after the *Varney* decision, the Court of Appeals for the Ninth
 22 Circuit, in an unpublished decision, held an ALJ need not address a claimant's testimony about
 23 side effects unless there is objective evidence of side effects. *See e.g. Roquemore v. Comm'r of
 Soc. Sec. Admin.*, 374 Fed.Appx. 693, No. 08-56894, 2010 WL 828603 at * 1 (C.A. 9, March 5,
 2010) (unpublished). But because *Roquemore* is not binding precedent, and *Varney* is, the Court
 21 is constrained to review this case under *Varney*. *See United States v. Corinthian College*, 655
 22 F.3d 984, 993 n.3 (9th Cir. 2011) (an unpublished disposition is not binding precedent).

23 In sum, under *Varney*, the ALJ's failure to address Ms. Jackson's testimony about the
 24 side effects of the medications is reversible error. Ms. Jackson testified that her medications
 25 made her sleepy and made it difficult for her to concentrate. This is a limitation the ALJ did not

1 address at all. This is thus not a case in which there was but passing mention of the effects of
2 medications which might relieve the ALJ of his obligation to address the limitation. *See*
3 *Osenbrock v. Apfel*, 240 F.3d 1157, 1164 (9th Cir. 2001) (“There were passing mentions of the
4 side effects of Mr. Osenbrock’s medication in some of the medical records, but there was no
5 evidence of side effects severe enough to interfere with Osenbrock’s ability to work”). Rather,
6 as *Varney* instructs, an ALJ may either accept a claimant’s testimony regarding side effects or
7 make specific findings rejecting such evidence. That did not occur here and thus the matter
8 should be remanded with direction that the ALJ make specific findings as to Ms. Jackson’s
9 testimony regarding the side effects of her medications.

10 **CONCLUSION**

11 The Court recommends **REVERSING** the Commissioner’s final decision and
12 **REMANDING** the case for further administrative proceedings under sentence four. On remand,
13 the ALJ should assess Ms. Jackson’s testimony about the side effects of her medications and
14 develop the record as appropriate. Objections to this Recommendation must be filed by **April 21**.
15 If no objections are filed, the Clerk should note the matter for **April 25, 2014**, as ready for the
16 Court’s consideration. If objections are filed, a response is due within 14 days after being served
17 with the objections. A party filing an objection must note the matter for the Court’s
18 consideration 14 days from the date the objection is filed.

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Objections and responses are limited to six pages. The failure to timely object may affect the right to appeal.

DATED this 7th day of April, 2014.

Brian A. Tsuchida
BRIAN A. TSUCHIDA
United States Magistrate Judge